Supreme Court, U.
FILED
NOV 12 19
JOSEPH F. SPANIOL
CLERK

No. 85-527

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FAITH CENTER, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
T. JAY BARRYMORE
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3898
Counsel for Petitioner

Of Counsel
GEORGE MIRON
STEVEN A. GLAZER
WYMAN, BAUTZER, ROTHMAN, KUCHEL & SILBERT
600 New Hampshire Avenue, N.W., Suite 580
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
I. The FCC's Position is Inconsistent with Decisions of this Court Requiring the Government to Accommodate Free Exercise Rights When the Government Has Not First Established a Compelling Interest and the Absence of a Less Restrictive Alternative	1
II. Because the FCC's Procedures Were Constitutionally Deficient, Petitioner Should Not Have Been Required "to Take the First Step in Such a Procedure"	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Faith Center, Inc., 82 F.C.C. 2d 1 (1980) 3
Goldman v. Weinberger, 734 F.2d 1531 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 3475 (1985) (No. 84-1097) 4
In Re First National Bank, 701 F.2d 115 (10th Cir. 1983) 4
Local 1814, International Longshoreman's Assoc. v. Waterfront Commission, 667 F.2d 267 (2d Cir. 1981) 4
Peters v. Hobby, 349 U.S. 331 (1955) 7
Pollard v. Roberts, 283 F. Supp. 248 (E.D. Ark.) (three judge court), *aff'd per curiam*, 393 U.S. 14 (1968) 4, 7
Roy v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984), *prob. juris. noted sub nom. Heckler v. Roy*, 105 S. Ct. 3474 (1985) (No. 84-780) 4-5
Shelton v. Tucker, 364 U.S. 479 (1960) 6
Sherbert v. Verner, 374 U.S. 398 (1963) 2
Speiser v. Randall, 357 U.S. 513 (1958) 6, 8
Thomas v. Review Board, 450 U.S. 707 (1981) 2
United States v. Carver, 260 U.S. 482 (1923) 3
United States v. Church of World Peace, No. 84-2200 (10th Cir. Oct. 22, 1985) 3-4
United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980) 4
United States v. Lee, 455 U.S. 252 (1982) 2, 3
Wisconsin v. Yoder, 406 U.S. 205 (1972) 2, 3, 4

CONSTITUTION AND STATUTE:

U.S. Const. Amend. I ..... *passim*
26 U.S.C. § 7605(c) 4

OTHER AUTHORITIES:

Hardy & Secrest, Religious Freedom and the Federal Communications Commission, 16 Val. U.L. Rev. 57 (1981) 7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-527

FAITH CENTER, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

This is a sad and discouraging case. It should not have arisen. And it would not have arisen if the Federal Communications Commission had been sensitive to the fundamental and delicate role that freedom of religion plays in our history and in our constitutional system, and had established procedures that would have guided its staff in giving appropriate protection to sincere and strongly-held claims of religious freedom.

I. The FCC's Position is Inconsistent with Decisions of this Court Requiring the Government to Accommodate Free Exercise Rights When the Government Has Not First Established a Compelling Interest and the Absence of a Less Restrictive Alternative

The government's Brief in Opposition underscores the need for this Court to grant review. The government's position is startlingly simple: the First Amendment does

not require any accommodation to the free exercise rights of the members of a religious group that engages in commercial activity subject to governmental regulation. (*See* Br. in Opp. at 5-6.) There is, indeed, no evidence of "commercial" activity here; the petitioner's activities were a part of its religious ministry. Moreover, the government's position is inconsistent with this Court's First Amendment decisions, which require the government to accommodate the exercise of religious rights when the government has not first established a compelling interest and the absence of a less restrictive alternative.

The government's argument—that a religious organization has no right to be treated any differently from any other party subject to a neutral government regulation, which evokes fundamental principles of equality—does have a surface appeal. Nevertheless, this Court has rejected this very position on several occasions. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). In each of these cases, this Court rejected the government's argument that the First Amendment did not require an exemption from a facially neutral governmental requirement.

These cases do not, of course, establish that any First Amendment claim warrants a special exemption. This Court has never read the First Amendment in such an absolute manner. Indeed, in certain instances, this Court has found that a particular burden on religious liberty was "essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257-58 (1982).[1] Because of the importance of First Amendment

---

[1] The government (Br. in Opp. at 5-6) reads *Lee* far too broadly. *Lee* did not purport to overrule *Thomas, Yoder,* and *Sherbert. Lee* still requires the government to justify a burden on religious liberty. The government's position in this case, that the First Amendment does not prevent the compelled disclosure of donor records, even though such disclosure would violate petitioner's

rights, this Court, when faced with a significant burden on religious freedom, has, however, "searchingly examine[d] the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption." *Wisconsin v. Yoder*, 406 U.S. at 221. The FCC's procedures fail to satisfy these standards.

The government contends that the Commission did consider petitioner's constitutional claims. (*See* Br. in Opp. at 8.)[2] Nowhere in its opinion in the San Bernadino case, however, did the Commission discuss the constitutional issues raised by the compelled disclosure of donor records. Furthermore, nowhere in that opinion did the Commission "searchingly examine" either the burden on petitioner's free exercise rights or the claim that the government had a compelling interest in the disclosure sought. Rather, the Commission stated petitioner was required to "justif[y]" its failure to violate its religious principles and that petitioner had "not demonstrated that specific discovery requests [were] . . . irrelevant to the Commission's legitimate inquiry . . . ." *Faith Center, Inc.*, 82 F.C.C. 2d 1, 21 (1980).

The FCC's approach here was recently rejected by the Tenth Circuit in *United States v. Church of World Peace*, No. 84-2200 (10th Cir. Oct. 22, 1985). In *Church of World Peace*, an IRS summons "sought all the books, records and accounts" of the Church. The Church resisted enforcement of the summons because, *inter alia*, the sum-

---

religious beliefs, and even though petitioner did not have an opportunity to obtain a ruling on its constitutional claim *prior* to the imposition of sanctions, stretches *Lee* beyond recognition.

[2] The government and respondent New Inspiration Broadcasting Co. also accord significance to this Court's denial of certiorari in the San Bernardino proceeding. This ignores the long-settled rule that "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

mons sought membership lists the Church claimed were protected by the First Amendment. The Tenth Circuit set aside enforcement of the summons as to the membership lists on First Amendment grounds because the government had not met its burden of showing a compelling need for the material. *Church of World Peace, supra*, slip op. at 2 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).[3]

As mentioned in the Petition (Pet. at 22), the broader issue—when does the First Amendment require an exemption from a facially neutral governmental requirement—is one that this Court has faced on numerous occasions, including two cases currently pending. *Goldman v. Weinberger*, 734 F.2d 1531 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 3475 (1985) (No. 84-1097); *Roy v. Cohen*, 590 F. Supp. 600 (M.D. Pa. 1984), *prob. juris. noted sub*

---

[3] The courts have consistently required that First Amendment objections to discovery be considered at evidentiary hearings. In *In re First National Bank*, 701 F.2d 115 (10th Cir. 1983), the court reversed an order enforcing a grand jury subpoena and remanded for an evidentiary hearing to consider a First Amendment claim. The court stated:

> If the district court determines that enforcement of the subpoena would likely chill associational rights, the Government must show a compelling need to obtain documents identifying petitioners' members. . . . In balancing the interests involved, the court should consider whether the Government can acquire the material it ostensibly seeks by obtaining the records with the members' names deleted, or by otherwise limiting the breadth of the subpoena . . . .

701 F.2d at 119 (citations omitted). *See also Local 1814, International Longshoreman's Assoc. v. Waterfront Commission*, 667 F.2d 267 (2d Cir. 1981); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968).

As the *Church of World Peace* case shows, Congress has recognized the problem with respect to subpoenas in tax cases in sec. 7605(c) of the Internal Revenue Code. The Federal Communications Commission should not be allowed to use a lesser standard—indeed, no standard at all.

nom. Heckler v. Roy, 105 S.Ct. 3474 (1985) (No. 84-780). There is a particular need to resolve the question in the context presented by this Petition. This Court should decide whether the government is correct in asserting that, despite the dictates of the First Amendment, the FCC has unlimited authority during the discovery stage of its investigations.

II. Because the FCC's Procedures Were Constitutionally Deficient, Petitioner Should Not Have Been Required "to Take the First Step in Such a Procedure"

The government's second argument (*see* Br. in Opp. at 7-8), which is tantamount to a waiver theory, does not address directly the overbreadth argument made by petitioner. (*See* Pet. at 19-21). The government's argument has two layers, neither of which diminishes the importance of the questions presented.

First, the government's contention that the FCC never required petitioner to disclose donors' names is amply rebutted by the Record.[4] Second, the government's position

---

[4] The government's citation to two footnotes in which the Broadcast Bureau allegedly disclaimed any present intention of requiring the disclosure of donors' names is a very slender reed. This argument simply fails to explain why the issue of donor records was still a subject of dispute after the Broadcast Bureau's alleged disclaimer. (*See* D.C. No. 84-1085, Jt. App. at 2947-51 (discussing petitioner's effort to submit donor records with names and addresses deleted)). In addition, the proceedings described on pages 12-13 of the Petition, which involved petitioner's continuing efforts to resist the compelled disclosure of donor records, all post-dated the Bureau's alleged disclaimer.

The government erroneously implies (*see* Br. in Opp. at 7 (citing 82 F.C.C. 2d at 3n. 6, and 69 F.C.C. 2d at 1127 n.1)) that the FCC had a consistent policy of disclaiming an intention to seek donor names. In the San Bernardino proceeding, the Commission had initially indicated that it would follow such a position. (*See* Pet. at 10 n.8.) Nevertheless, the Bureau's later interrogatories and production requests did in fact seek donor records. (D.C. No. 84-1085, Jt. App. at 5061-5073, 6010-20; D.C. No. 83-2295, Jt. App. at 86-103.)

that petitioner is not entitled to relief because its objections went beyond the category of donor records ignores this Court's overbreadth decisions, which permit facial challenges to allegedly overbroad statutes or regulations covering both protected and unprotected activities.[5] (*See* Pet. at 19-21.) The government's analysis similarly overlooks *Speiser v. Randall*, 357 U.S. 513 (1958), in which this Court stated: "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure." *Id.* at 529.

Moreover, the Court should be aware of the sweeping nature of the demands made by the Commission's staff. There were a total of 69 interrogatories, involving 250 distinct questions. There were demands for virtually all of Faith Center's records from September 1976 "to the present." The document requests asked for "All documents identified in response to" the Mass Media Bureau's interrogatories, which were expressly made continuing. (D.C. No. 84-1085, Jt. App. at 5062, 5065, 6020.) In conjunction with interrogatories requesting such information as "the identity of the broadcast programs during which solicitations for money are/were made," the document requests required the production of all video tapes of Faith Center programs from September 1976 to the present, which covers tens of thousands of hours of broadcasting. The total value of these tapes alone, as blanks, would come to hundreds of thousands of dollars, and these tapes would be unavailable for use by the petitioner while

---

[5] In *Shelton v. Tucker*, 364 U.S. 479 (1960), which invalidated an Arkansas statute with an "unlimited and indiscriminate sweep," this Court stated: "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488 (footnotes omitted).

they were in the government's custody. The requests also called for "All documents reflecting money received" from September 1976 to the present. (*Id.* at 5062.) There were numerous other interrogatories such as requests for all documents related to "the procedures followed by Faith . . . from the time the money was received in the mail room until the time it was expended," and "financial records and books." (*Id.* at 5072-73.) Together with the production requests, these interrogatories required the production of all financial records of petitioner, including all records with donor information, from September 1976 to the present.

It is plain from the record that the staff of the Commission was completely insensitive to the claims of religious freedom, and made no effort to narrow its demands. The staff undertook a general dragnet fishing expedition into all of the petitioner's activities, impinging heavily on sensitive issues of religious freedom.[6] It is apparent that the Commission staff was annoyed that petitioner raised these religious issues and that the staff "threw the book" at the petitioner. If the petitioner then got its back up, and refused to cooperate with the staff, it is hardly surprising. That has been the way of persons seeking religious freedom over a long period of history.[7]

---

[6] It should be mentioned, in addition, that the government began this investigation on rather weak evidence. (*See* Brief of Intervenor-Respondent Scott at 5-7.) The courts have often looked with disfavor on broad inquiries that impinge on First Amendment rights when the government inquiry is based on "mere suspicion." *Pollard v. Roberts*, 283 F. Supp. (E.D. Ark.) (three-judge court), *aff'd per curiam*, 393 U.S. 14 (1968). *Cf. Peters v. Hobby*, 349 U.S. 331, 350-52 (1955) (Douglas, J., concurring) (discussing constitutional infirmities of condemnation by "faceless informers").

[7] As a former General Counsel to the Federal Communications Commission has stated, "For our rights, our liberties, and our faiths to be protected, we must never drop our vigilance. Throughout history religious expression has had to struggle with those who would silence the message, either by design or by thoughtless action and

But, it is said that the petitioner sought a ruling from the Administrative Law Judge prematurely. The petitioner was told that it could not get a decision on its religious claims until it had complied with the discovery orders. The ALJ specifically stated that "Faith will be able to make its Constitutional arguments on the merits during the hearing," (D.C. No. 84-1085, Jt. App. at 296), which would have been, of course, *after* petitioner's religious freedom had been violated.

This procedure has continued ever since. No agency of the Commission, including the Commission itself, and no court has given the petitioner a hearing on its religious claims that disclosing donor records would violate its religious beliefs. In the Los Angeles proceeding, petitioner was even told by the ALJ that "We don't hold hearings on constitutional issues at this agency that I know of." (D.C. No. 83-2295, Jt. App. at 33.)

Here, it is the entire FCC "procedure"—or rather the lack of a procedural mechanism by which petitioner could receive a prior adjudication of its constitutional claim (*see* Pet. at 12-13)—that is constitutionally flawed. Petitioner should not have been required "to take the first step in such a procedure." *Speiser*, 357 U.S. at 529. This Court should grant review to ensure that other First Amendment claimants are not faced with the choice of violating their beliefs without first having an opportunity to obtain a ruling on their constitutional claims.

---

inattention. History has not changed, and it is the duty and responsibility of every religious broadcaster, and every member of the religious community, to man the watchtowers to prevent the otherwise certain erosion of our religious liberties." Hardy & Secrest, *Religious Freedom and the Federal Communications Commission*, 16 Val. U.L. Rev. 57, 100-101 (1981).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)
RICHARD S. MYERS
T. JAY BARRYMORE
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3898
Counsel for Petitioner

Of Counsel
GEORGE MIRON
STEVEN A. GLAZER
WYMAN, BAUTZER, ROTHMAN, KUCHEL & SILBERT
600 New Hampshire Avenue, N.W., Suite 580
Washington, D.C. 20037

November, 1985